DONALD K. MAJORS

IBLA 90-364 Decided May 28, 1992

Appeal from a decision of the Area Manager, San Juan Resource Area, Colorado, Bureau of Land Management, granting status as affected interest in grazing management decisions pertaining to Cross Canyon Allotment No. 8007.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Federal Land Policy and Management Act of 1976: Public Participation--Grazing Permits and Licenses: Generally

   It is within the authorized officer's discretionary authority to grant "affected interest" status pursuant to 43 CFR 4100.0-5, for purposes of being involved in grazing management pursuant to the applicable regulations in 43 CFR Part 4100, to a person who has used grazing allotment lands for recreation and filed a written request for affected interest status.

APPEARANCES: Todd S. Welch, Esq., Steven Lechner, Esq., William Perry Pendley, Esq., C. Thomas Blickensderfer, Esq., Denver, Colorado, for appellant; Thomas D. Lustig, Esq., Boulder, Colorado, for Gary T. Skiba; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Donald K. Majors has appealed from a May 9, 1990, decision of the Area Manager, San Juan Resource Area, Colorado, Bureau of Land Management (BLM), granting Gary T. Skiba status as an "affected interest" under 43 CFR 4100.0-5 in grazing management decisions for Cross Canyon Allotment No. 8007, held by Majors.

The material facts in this case are simple, and, for the most part, undisputed. Allotment No. 8007 is held by Majors and used for winter grazing. On March 27, 1990, the San Juan Resource Area Office received a letter from Skiba asking BLM to recognize him as a "potentially affected interest" in BLM's management of the "grazing allotment which includes Cross Canyon," identified by Skiba as being primarily in T. 37 N., R. 20 W., New Mexico

Principal Meridian, Colorado. He based his request on his use of Cross Canyon as a destination for backpacking and visiting archaeological sites and his concern that grazing use could be "better managed."

In her May 1990 decision recognizing Skiba as an affected interest, the Area Manager stated that granting that status was "consistent" with sections 103(d), 202(f), and 309(e) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1702(d), 1712(f), 1739(e) (1988), and section 8 of the Public Rangelands Improvement Act of 1978 (PRIA), P.L. 95-514, 92 Stat. 1807 (codified at 43 U.S.C. § 1752(d) (1988)), which provide for public participation in land-use planning and management. She concluded that recognizing Skiba as an affected interest would require BLM to consult with him when developing allotment management plans (citing 43 CFR 4120.2), modifying terms and conditions of grazing permits (citing 43 CFR 4130.6-3), and implementing changes in active grazing use (citing 43 CFR 4110.3-3). She also stated that Skiba would have a right to protest proposed decisions (citing 43 CFR 4160.2). Majors appealed from this decision.

Before we address the merits of the appeal, we will address BLM's requests that the Board dismiss Majors' appeal for lack of standing because there is no evidence that Majors was adversely affected by the decision. To have standing to appeal from a BLM decision, an appellant must be a party to the case "who is adversely affected by [the] decision." 43 CFR 4.410(a). Thus, the question is whether Majors was adversely affected by the Area Manager's May 1990 decision. We conclude that he was adversely affected by that decision.

Adverse affect is demonstrated when a party establishes that he has a legally cognizable interest which has been injured or that there is a substantial likelihood that it will be injured by the challenged BLM action. See, e.g., Colorado Open Space Council, 109 IBLA 274, 280 (1989). It is clear that Majors has a legally cognizable interest in the Cross Canyon allotment. He holds an authorized grazing use. 1/ See Storm Master Owners, 103 IBLA 162, 177 (1988). The remaining question is whether that interest has been injured or that there is a substantial likelihood that it will be injured by the BLM decision.

In her May 1990 decision, the Area Manager acknowledged that, by recognizing Skiba as an affected interest, BLM has become obligated to consult with Skiba when formulating allotment management plans, modifying terms and conditions of grazing permits, and implementing changes in active grazing use. BLM's preparation of the management plan for the Cross Canyon allotment must now include "consultation, cooperation, and coordination with * * * affected interests." 43 CFR 4120.2(a). When considering the advisability of modifying the terms and conditions of Majors' grazing permit to

1/ BLM recognizes his legally cognizable interest. See Respondent's Rebuttal to Appellant's Reply to Respondent's Answer at 1.

meet land-use plan or management objectives, BLM must engage in "consultation, cooperation, and coordination with * * * affected interests." 43 CFR 4130.6-3. Similarly, when BLM considers changing Majors' active grazing use by more than 10 percent, the "affected interests" will be a necessary party to any agreement to implement the change in less than 5 years. 43 CFR 4110.3-3(a). BLM will be required to consult with "affected interests" prior to closing the allotment in whole or in part or modifying authorized grazing use to deal with a temporary threat to the relevant resources. 43 CFR 4110.3-3(c). Finally, "affected interests" are granted the right to protest any proposed BLM decision regarding issuance of or the terms and conditions of appellant's grazing permit. 2/ 43 CFR 4160.2.

BLM's decision has raised the substantial likelihood of Skiba's participation in the near future. In other cases we have held that, even though a decision has no immediate consequences, a substantial likelihood that in the near future the party will be injured in some way by the decision under appeal is sufficient to establish standing to appeal. See Dorothy A. Towne, 115 IBLA 31, 35 (1990) (threat to domestic water from permitting redrilling of geothermal well); Penroc Oil Corp., 84 IBLA 36, 38 (1984) (threat to potential use of or production from oil and gas well from permitting disposal of salt water); Desert Survivors, 80 IBLA 111, 113 (1984) (threat to water source from approval of mining operations); Crooks Creek Commune, 10 IBLA 243, 246 (1973) (threat to adjacent land from proposed timber sale); James W. McDade, 3 IBLA 226, 229 (1971), aff'd, McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974) (threat to oil and gas lease offers from potential issuance of leases).

Thus, we have held that the likelihood that a determination by BLM that the Federal Government does not have title to land in the case of a Mexican land grant would unsettle titles throughout the State of California afforded the State standing to appeal in State of California, 121 IBLA 73, 113, 98 I.D. 321, 343 (1991). There was no evidence that any title was in fact unsettled as a result of the determination. Nevertheless, it was the substantial likelihood that this would occur that afforded standing to the State. Likewise, it was the substantial likelihood that BLM's including land in wilderness study areas would render future State selections invalid that afforded the State standing to appeal from the designations in California State Lands Commission, 58 IBLA 213, 216, 217 (1981). See also Koniag, Inc. v. Andrus, 580 F.2d 601, 607-08 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978); 3/ State of Alaska v. Sarakovikoff, 50 IBLA 284, 288 (1980).

2/ Copies of proposed decisions under 43 CFR 4160.1-1 are sent to all "affected interests" to facilitate the right to file a formal protest.

3/ In a concurring opinion in Koniag, Inc. v. Andrus, supra at 615, the Judge advocated a functional analysis for determining standing in the administrative context. This functional analysis would focus on "the nature of the asserted interest [of the party seeking standing], the relationship of his interest to the functions of the agency, and

The BLM decision before us recognizes Skiba as an affected interest, raising a substantial likelihood that, in the near future, his participation will have an impact upon BLM's preparation of an allotment management plan and/or a modification of the terms and conditions of appellant's grazing permit, including his authorized grazing use. 4/ Majors asserts that, because of their conflicting views regarding proper use of the allotment lands, it will be necessary for him to respond to all of Skiba's assertions, requiring employment of legal counsel and experts and detracting from his ability to manage his herd and the allotment. See Reply of Donald K. Majors to Respondent's Answer at 7-8. The grant of affected interest status may well make response to adverse comments submitted by Skiba mandatory. To do otherwise would risk having the adverse comments adopted by BLM. This line of reasoning does not establish conclusively that Majors' grazing rights will be adversely affected by BLM's decision, but is sufficient to raise "colorable allegations of injury," and that is all that is required. 5/ California State Lands Commission, supra at 217.

In Star Lake Railroad Co., 121 IBLA 197, 201-02, 98 I.D. 398 (1991), we concluded that the holder of a right-of-way had standing to appeal BLM's transfer of the administration of the right-of-way to the Navajo Tribe of Indians (Tribe). The transfer did not immediately affect the holder because there had been no effort by the Tribe to renew, cancel, or take other administrative action with respect to the right-of-way at

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fn. 3 (continued)
whether an award of standing would contribute to the attainment of these functions." We have adopted this analysis on other occasions (see Animal Protection Institute of America, 117 IBLA 208, 210 (1990)), and find that Majors has standing to pursue this appeal using that test. Appellant is clearly in a position to judge the propriety of a BLM decision to recognize a particular party (such as Skiba) as one whom BLM must consult. Thus, an award of standing would clearly contribute to the attainment of the functions of the Department in this regard.

4/ In his request, Skiba expressed concern regarding perceived deterioration in range conditions. Skiba also notes that if he is unable to participate as an "affected interest" there will be a "continuation of present grazing practices." It is clear that his interest in the land conflicts with Majors'. In his notice of appeal Majors states that he is authorized to graze 300 head of cattle on the allotment during the winter, but that for the last two grazing seasons he has voluntarily reduced his period of use to avoid resource damage due to a drought spanning the last 3 years. Accepting Majors' observations as accurate, we believe that there is a distinct possibility that BLM will consider changes in the extent and/or manner of appellant's authorized grazing use in an allotment management plan or a modification of the terms and conditions of Majors' grazing permit.

5/ Contrary to BLM's assertion, an appellant need not "demonstrat[e]" that the alleged injury has occurred as a result of the challenged BLM decision (Respondent's Rebuttal to Appellant's Reply to Respondent's Answer at 2).

the time of the transfer. Nonetheless, we found a substantial likelihood that the change in administration would affect the right-of-way holder's operations and the continued viability of the right-of-way.

In both Star Lake Railroad Co. and this case, consideration of the foreseeable impact of the decision upon the principal party involved demonstrates a substantial likelihood that the decision will have an adverse impact on the appellant. Majors is no less or more burdened by BLM's action than the right-of-way holder in Star Lake. We find Star Lake eminently supportive of a finding that Majors has standing. The Area Manager's May 1990 decision raises sufficient likelihood that injury will result to afford appellant standing to appeal from that decision. BLM's motion to dismiss for lack of standing is denied.

Before considering whether it was proper for BLM to grant Skiba "affected interest" status within the meaning of 43 CFR 4100.0-5, we find it necessary to note that we are not addressing whether this decision grants Skiba an automatic right to appeal a BLM decision concerning grazing management to an Administrative Law Judge or this Board. There is nothing in the grazing regulations that gives a party with "affected interest" status pursuant to 4100.0-5 an automatic right to appeal. 6/ The regulation at 43 CFR 4160.4 recognizes only that a person "whose interest is adversely affected by a final [BLM] decision" may appeal to an Administrative Law Judge. (Emphasis added.) See also 43 CFR 4.470(a). The right to appeal to this Board is limited by 43 CFR 4.410(a) to those whose interest is "adversely affected." The phrase "affected interest" does not carry the same meaning as "adversely affected." See 49 FR 6441 (Feb. 21, 1984). BLM's designation of a person as an "affected interest," within the meaning of 43 CFR 4100.0-5, will not automatically afford that person the right to appeal. To hold otherwise would usurp the authority granted to the Administrative Law Judge, and this Board, to decide who is entitled to appeal. See Oregon Natural Resources Council, 78 IBLA 124, 127 (1983).

We will next consider whether BLM properly granted Skiba "affected interest" status within the meaning of 43 CFR 4100.0-5, in the context of managing grazing use on the Cross Canyon allotment under the Department's regulations set forth at 43 CFR Part 4100. To this end we will begin with the dictates of FLPMA and PRIA invoked by the Area Manager in her May 1990 decision.

In the context of providing for land-use planning, section 202(f) of FLPMA directs the Secretary "[to] allow an opportunity for public involvement and by regulation [to] establish procedures * * * to give * * * the public * * * adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management

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6/ "Affected interests" are entitled to notice in the form of a proposed decision, an opportunity to comment, and a copy of a final BLM decision under 43 CFR 4160.3(b).

of the public lands." 43 U.S.C. § 1712(f) (1988). Section 309(e) of FLPMA directs the Secretary "[to], by regulation, * * * establish procedures * * * to give * * * the public adequate notice and an opportunity to comment upon * * * and * * * participate in * * * the management of * * * the public lands." 43 U.S.C. § 1739(e) (1988). The statutory procedures call for public comment and participation in the formulation of land-use plans as well as the actual management of public lands. 7/

[1] Having addressed the statutory requirement for public participation in planning and management decisions we will turn to the specific regulations designed to implement sections 202(f) and 309(e) of FLPMA with respect to grazing use on public lands. In the context of devising allotment management plans, permitting grazing use, and protesting proposed decisions regarding grazing permits, the Department has limited participation to those having "affected interests." See 43 CFR 4120.2(a), 4110.3-3(a) and (c), 4130.6-3, and 4160.2.

For purposes of the regulations in 43 CFR Part 4100, "affected interest" is defined as "an individual * * * that has expressed in writing to the authorized officer concern for the management of livestock grazing on specific grazing allotments and who has been determined by the authorized officer to be an affected interest." 43 CFR 4100.0-5 (emphasis added). 8/ It can be seen that this regulation has two parts. The first is the requirement that an individual must express concern for management of a particular allotment "in writing." The second is the provision for a discretionary determination by the authorized officer that the individual should be granted "affected interest" status. 9/

7/ The Area Manager also referred to section 8 of PRIA. That Act specifically applies to management of grazing use, but has a more limited application than the cited FLPMA sections. In relevant aspect, it provides for the development of allotment management plans "in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved, the district grazing advisory boards * * * , and any State or States having lands within the area to be covered by * * * [the] plan." 43 U.S.C. § 1752(d) (1988). There is no mention of public involvement or reference to giving the public an opportunity to comment and participate in development of an allotment management plan. It, therefore, has no particular relevance to Skiba, who does not qualify under any of the listed categories.

8/ Majors also challenges this regulation. We have no authority to declare a duly promulgated regulation invalid or amend its provisions. See, e.g., ANR Production Co., 118 IBLA 338, 343 (1991); D. R. Gaither, 32 IBLA 106, 111 (1977), aff'd, Rowell v. Andrus, No. C 77-0106 (D. Utah Apr. 3, 1978), aff'd in part, vacated in part, 631 F.2d 699 (10th Cir. 1980).

9/ Skiba argues that all that is needed for "affected interest" status is an expression of concern. See Answer of Gary T. Skiba to Appellant's Statement of Reasons (SOR) at 11-12. This argument runs counter to 43 CFR 4100.0-5, which requires an expression of concern and a BLM determination.

This Board will afford considerable deference to the party exercising discretionary authority when the exercise appears to be reasonable and supported by the evidence. See Fancher Oil Co., 121 IBLA 397, 402 (1991); see generally United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 526 (D.C. Cir. 1978).

The Department has not set out a regulatory definition of the term "affected." Black's Law Dictionary (5th ed. 1979), at page 53, defines "affect" as "to act upon; influence; [or] change." Thus, someone will be deemed "affected" if he has been acted upon, influenced, or changed. Accepting this definition there is no basis for deeming the decision arbitrary, and there is sufficient evidence to support BLM's decision that Skiba holds an affected interest in BLM's management of grazing use on the Cross Canyon allotment. He stated his use of that land and expressed his concern in writing. To the extent that he has thus been and will be affected by BLM's management of grazing on the allotment, there is a factual basis for a discretionary finding that he has an "affected interest."

Majors advocates reliance on the "adverse affect" rules of standing to determine whether an individual is properly deemed "affected." 10/ As noted previously, we find no support for this approach in the regulations or in the rulemaking. See 49 FR 6440 (Feb. 21, 1984). Majors also seeks to have us conclude that an individual (such as Skiba) who does not "make a living from the land" lacks standing (SOR at 2). 11/ There also is no

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fn. 9 (continued)
This is essentially a joinder of two earlier disparate bases for finding an affected interest. 43 CFR 4100.0-5(b) (46 FR 5788 (Jan. 19, 1981)) provided that "affected interests" means "any individual * * * who has been identified by the authorized officer as being potentially affected by a proposed action or who has expressed, in writing to the authorized officer, concern for the management of livestock grazing on specific grazing allotments." Id. (emphasis added). The Department proposed changing this language by dropping the word "potentially" and inserting "and" in place of "or." See 48 FR 21822 (May 13, 1983). This would have had the affect of requiring an individual to express his concern in writing and for BLM to identify him as affected by a proposed grazing action. In final rulemaking the two requirements were transposed and the wording was changed to its current form. See 49 FR 6449 (Feb. 21, 1984). There is no suggestion that the two conjoint requirements did not persist. See id. at 6441.

10/ Majors also refers to the statutory limitation of public involvement to "affected citizens." 43 U.S.C. § 1702(d) (1988). However, we are not persuaded that the statutory requirements of providing opportunities for the public to participate in land-use planning and management of the public lands are so limited. See 43 U.S.C. §§ 1712(f), 1739(e) (1988). We therefore focus on the meaning of an "affected interest" in 43 CFR 4100.0-5.

11/ Skiba seeks to intervene in this proceeding. He could have independently maintained an appeal. See Sierra Club-Rocky Mountain Chapter, 75 IBLA 220, 221-22 n.2 (1983). We hereby grant his request, and his answer has been considered in this decision.

basis for limiting the authorized officer's discretionary authority in this manner. The similar argument that the interest of those who engage in recreational pursuits on public land is the same as "every other individual in the country" also fails. Those who use the land for any legitimate purpose can be found to have an interest or stake in the welfare of that land. 12/

We find nothing in the regulations to support a conclusion that the authorized officer exceeded her discretionary authority when granting Skiba affected interest status under 43 CFR Part 4100. Considering the Department's desire to seek comment and advice regarding its grazing management decisions from interested parties, the Area Manager's May 1990 decision granting Skiba "affected interest" status within the meaning of 43 CFR 4100.0-5 for purposes of involvement in the management of the Cross Canyon allotment for grazing purposes was not prohibited by the applicable regulations, arbitrary, or unsupported by the facts. 13/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

12/ We also find appellant's citation to Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), aff'd, 405 U.S. 727 (1972), disingenuous. We are satisfied that Skiba is attempting to vindicate more than his "value preference[]." 405 U.S. at 740.

13/ The effect of the Area Manager's decision was stayed during the pendency of this appeal. It is no longer necessary to consider whether the stay should be lifted.